

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

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GREGORY M. LACY,)	DOCKET NUMBER
Appellant,)	SF-0752-97-0367-I-1
)	
v.)	
)	
DEPARTMENT OF THE NAVY,)	DATE: JUN 2, 1998
Agency.)	
)	
)	
)	

Gregory M. Lacy, San Diego, California, pro se.

Lynn M. Rizer, San Diego, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the initial decision issued on June 27, 1997, that dismissed his appeal as untimely filed. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was employed in the position of Production Controller, GS-5, at the North Island Naval Air Station, San Diego, California. *See* Initial Appeal File (IAF), Tab 1. The agency removed him effective November 16, 1996, based on charges of: (1) Being away from his assigned work station without permission (second offense); (2) unauthorized absence (second offense); and (3) failure to properly report an unscheduled absence (second offense). *Id.*, Tab 3.

On March 1, 1997, the appellant filed an appeal from the agency's removal action. *Id.*, Tab 1. In his petition for appeal, the appellant acknowledged that his appeal was untimely, but stated that the delay was due to illness, i.e., depression. *Id.* In his acknowledgment order, the administrative judge notified the appellant, in general terms, that the appeal appeared to be untimely filed, that he had the burden of proof on this issue, and that he should submit evidence and argument to show that his appeal was timely filed, or that good cause existed for the delay in filing. *See* IAF, Tab 2. The agency moved to dismiss the appeal as untimely filed. *Id.*, Tab 3.

The administrative judge subsequently granted the agency's motion and dismissed the appeal as untimely filed, with no good cause shown for the delay. *See* Initial Decision at 2-3, *id.*, Tab 4. The appellant has now petitioned for review, again contending that the delay in filing his appeal was due to his deep depression. *See* Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 3.

ANALYSIS

A petition for appeal must be filed within 30 days after the effective date of the action being appealed. *See* 5 C.F.R. § 1201.22(b). This time limit may be waived only upon a showing of good cause for the delay in filing. *See* 5 C.F.R. §§ 1201.12, 1201.22(c). Here, the appellant's petition was filed more than two months after the 30-day time period had elapsed. *See* IAF, Tab 1. Therefore, the

appellant had the burden of showing that he acted with due diligence under the circumstances of the case, or that the delay was due to circumstances beyond his control. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The Board will find good cause for waiver of its filing time limits where a party demonstrates that he suffered from an illness that affected his ability to file on time. *See generally Hill v. Department of the Air Force*, 54 M.S.P.R. 254, 256 (1992), *aff'd*, 991 F.2d 808 (Fed. Cir. 1993) (Table). To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or a request for an extension of time.* *See generally Andrews v. Department of the Army*, 76 M.S.P.R. 147, 151 (1997).

* In *Hill v. Department of the Air Force*, 54 M.S.P.R. 254, 256 (1992), *aff'd*, 991 F.2d 808 (Fed. Cir. 1993) (Table), the Board stated that "[t]o establish good cause for the untimely filing, the appellant must establish how her illness prevented her from meeting the Board's filing requirements, and she must submit corroborating medical evidence." *Id.* at 256 (emphasis added). In subsequent restatements of the test, the Board sometimes referred simply to "corroborating evidence" without limiting the evidence to "medical" evidence, *see, e.g., Andrews v. Department of the Army*, 76 M.S.P.R. 147, 151 (1997), while at other times the Board required "medical evidence," *see, e.g., Edwards v. Department of the Army*, 63 M.S.P.R. 680, 682 (1994). Further, some cases have added a requirement that the appellant establish a "mental or physical incapacity." *See, e.g., Gilley v. Department of the Army*, 65 M.S.P.R. 277, 280 (1994).

Although medical evidence is preferable, we see no reason to limit the supporting ("corroborating") evidence only to "medical evidence" if the appellant explains why medical evidence is not available. Nor do we see a reason to impose a general "incapacitating" requirement. Rather, as set forth above, the appellant is only required to explain why the alleged illness impaired his ability to meet the Board's filing limits or seek an extension of time. To the extent that previous cases impose a requirement that the appellant be "incapacitated," or that medical evidence be required in every case, they are overruled.

Here, the appellant, who was pro se, alleged in his petition for appeal that it was untimely due to depression. *See* IAF, Tab 1. Nevertheless, the administrative judge's acknowledgment order did not set forth the specific showing that an appellant must make if he alleges that an untimely filing is due to illness. *Id.*, Tab 2. The agency's motion to dismiss the appeal as untimely filed also discussed the Board's case law relating to timeliness only in general terms. *Id.*, Tab 3. Similarly, the initial decision failed to state the legal standard for waiver of an untimely filing when the alleged cause for the delay was illness. *Id.*, Tab 4. Thus, the appellant was never, at any stage of the Board's proceedings below, informed of the specific criteria he was required to meet to make a showing of good cause under such circumstances, even though he placed the administrative judge on notice that he was claiming depression as the cause of the delay. When, as here, an appellant states that the reason for a filing delay is physical or mental illness, he must receive explicit information regarding the legal standard for establishing good cause on that basis, and he must be afforded a fair opportunity to submit evidence and argument to show that he met that standard.

In *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639 (Fed. Cir. 1996), the U.S. Court of Appeals for the Federal Circuit construed an acknowledgment order identical to the one at issue here, finding that "[a]n appellant cannot be expected to fight a fog of generality," but must be given a "full and fair opportunity to litigate the [timeliness] issue." *Id.* The specific timeliness questions here and in *Hamilton* are different. Here, the administrative judge's acknowledgment order failed to inform the appellant of what he was required to show to establish good cause for an untimely filing on the basis of his alleged mental illness. *See* IAF, Tab 2. In *Hamilton*, the acknowledgment order failed to advise the appellant of what she needed to submit to establish the date on which she received the agency's final decision on her formal complaint of discrimination. *See Hamilton*, 75 F.3d at 641, 646. The same principle that

guided the court in *Hamilton*, however, applies with equal force in this case: an appellant should be told what the timeliness issue is, and what he must show to establish either that his appeal is timely, or that there is good cause for waiving the time limit. *See also Pierce v. U.S. Postal Service*, 60 M.S.P.R. 26, 30 (1993). Therefore, we find that the administrative judge should have advised the appellant of what he needed to submit to prove that a mental condition prevented him from timely filing his appeal.

In *Williams v. Equal Employment Opportunity Commission*, 75 M.S.P.R. 144 (1997), the Board applied *Hamilton*, finding that the appellant should have received specific notice regarding the date on which the Board will presume receipt of a document that triggers the running of the filing period. *Id.* at 148. Similarly, in *Williams v. Department of Veterans Affairs*, 74 M.S.P.R. 472 (1997), the Board found that the appellant was unaware of the necessity of submitting evidence to show that her motion was timely filed, where neither the administrative judge's acknowledgment order, nor the agency's motion to dismiss, informed her of what was necessary to show that it was timely filed. *Id.* at 47; *cf. Persons v. U.S. Postal Service*, 75 M.S.P.R. 428, 432 (1997) (where the appellant filed an untimely appeal alleging involuntary retirement, the Board found that the appellant's burden of proof was adequately explained to him when the agency's motion to dismiss the appeal as untimely filed specifically stated that he had to show that "he put the agency on notice that he considered his retirement to be involuntary or that he otherwise lacked the capacity to make a voluntary decision and a timely filing"); *Dotson v. U.S. Postal Service*, 41 M.S.P.R. 412, 414-15 (1989), *aff'd*, 895 F.2d 1420 (Fed. Cir. 1990) (Table).

Moreover, it is well-settled that, for jurisdictional purposes, an order must provide the appellant with "explicit information" as to what is required to establish an appealable jurisdictional issue. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). While timeliness and

jurisdiction are different issues, the rules of fairness should apply to both inquiries.

We find that, because the appellant was never specifically informed of the three criteria he was required to meet to establish good cause for waiver of the Board's time limit on the basis of physical or mental illness, he was, in the words of the Federal Circuit, fighting a "fog of generality," and he was, therefore, denied a fair opportunity to address the timeliness issue. Accordingly, we find that the appeal must be remanded to provide the appellant with proper notice and a meaningful opportunity to file evidence and argument on the timeliness issue.

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board